STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

v

RICHARD RASMER, Personal Representative of Estate of OLIVE RASMER,

Defendant-Appellant.

SC No. 153356
COA No. 326642
Bay Probate Court

The Appeal involves a ruling that a provision of the Constitution, a statute, or other State governmental action is invalid.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153370
COA No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of IRENE GORNEY,

Defendant-Appellee.
/

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153371
COA No. 323185
Calhoun Probate Court
LC No. 13-000992-CZ

In re Estate of WILLIAM B FRENCH,

Defendant-Appellee.
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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

In re Estate of WILMA KETCHUM,

Defendant-Appellee.

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SC No. 153372
COA No. 323304
Clinton Probate Court
LC No. 14-028416-CZ

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153373
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RAMSER,

Defendant-Appellee.

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DEFENDANT-APPELLANT ESTATE OF OLIVE RASMER'S REPLY BRIEF IN NO. 153356

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ARGUMENT

I. MCL 400.112g-k SHOULD BE INTERPRETED TO REQUIRE THE DHHS TO PROVIDE WRITTEN NOTICE DESCRIBING THE PROVISIONS OF THE ESTATE RECOVERY PROGRAM AND WHAT ACTIONS MAY BE TAKEN AGAINST AN INDIVIDUAL'S ESTATE AT THE TIME THE INDIVIDUAL ENROLLS IN THE MEDICAID PROGRAM FOR LONG-TERM CARE SERVICES.

In construing a statute, courts must ascertain and give effect to the legislative intent. *Weakland v Toledo Engineering Co*, 467 Mich 344, 347 (2003). To this end, a statute must be read as a whole so as to harmonize the meaning of its separate provisions. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209 (1993). Thus, "[t]he interpretation to be given to a particular word in one section [is] arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 182-183 (1922). Here, the plain language of the statutory provisions themselves contradicts the DHHS' claim (Appellee's Br., p 7) that MCL 400.112g contains only "a single requirement for written information at § 112g(7)".

Specifically, MCL 400.112g(3)(e) states that the department of community health "at the time of enrollment shall provide ***written material*** explaining the process for applying for a waiver from estate recovery due to hardship." On the other hand, MCL 400.112g(7) states the department of community health "shall provide ***written information*** to individuals seeking medicaid eligibility for long term care services describing the provisions of the Michigan medicaid estate recovery program including, but not limited to a statement that some or all of their estate may be recovered." The unambiguous language of both MCL 400.112g(3)(e) and MCL 400.112g(7) thus requires written material or information regarding the hardship waiver *and* estate recovery.

Reading these separate statutory provisions harmoniously, it is apparent that the Legislature created a procedure for the DHHS to recover the costs of the benefits paid to a Medicaid beneficiary from his or her estate after death. That procedure established by the provisions of the Michigan Medicaid estate recovery program requires that the DHHS provide actual notice in the form of written materials to a potential Medicaid beneficiary at the time of his or her application for enrollment in Medicaid. In this case, the DHHS failed to comply with that procedure by providing Olive Rasmer with written notice of the provisions of the estate recovery program and what actions could be taken against her estate at the time she applied for enrollment in Medicaid.

Moreover, reading these separate statutory provisions harmoniously to require proper written notice of the estate recovery program at the time an individual applies for enrollment in Medicaid most faithfully comports with the procedural requirements imposed by federal law. *Schweiker v Gray Panthers,* 453 US 34, 36-37 (1981). Specifically, § 3810G(1) of the CMS' *State Medicaid Manual* states that the State "should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State." Even though § 3810G(1) uses "should," instead of "shall" or "must," there is little question that the CMS is directing the DHHS to provide proper written notice to individuals at the time of their application for Medicaid. Acting in accordance with the CMS' directive thus requires reading both MCL 400.112g(3)(e) and MCL 400.112g(7) harmoniously to require proper written notice of the estate recovery program at the time an individual applies for enrollment in Medicaid since that is the statutory interpretation that most faithfully comports with the purpose of the procedural regulation imposed by federal law.

Notwithstanding the fact that the DHHS failed to provide Olive Rasmer with written notice of the provisions of the estate recovery program and what actions could be taken against her estate at the time she applied for enrollment in Medicaid, the DHHS asserts that "MCL 400.112g-k contain no express or implied bars to estate recovery . . . based on any failure or insufficiency of notice or information given to applicants or recipients of Medicaid." (Appellee's Br., p 7). Stated in different terms, the DHHS claims that "in the plain language of MCL 400.112g-k there is no provision for any sanction or bar to recovery for insufficient written information and no cause of action for the Department's failure." (Appellee's Br., p 21). Essentially, the DHHS' claim is that there is no statutory remedy for its failure to provide the statutorily-mandated written notice to Medicaid beneficiaries of the provisions of the estate recovery program at the time of enrollment in Medicaid.

Although the Legislature did not explicitly provide a statutory remedy, the question is whether courts may fill the gap by creating a remedy for the statutory violation when the Legislature has not seen fit to provide one. *Lash v City of Traverse City*, 479 Mich 180, 193 (2007); see also *People v Anstey*, 476 Mich 436, 445 n7 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create."). Nevertheless, in *People v Gaston (In re Forfeiture of Bail Bond)*, 496 Mich 320 (2014), this Court held:

> When a statute provides that a public officer "shall" undertake some action within a specified period of time, and that period of time is provided to safeguard another's rights or the public interest, as with the statute here [MCL 765.28(1)], it is mandatory that such action be undertaken within the specified period of time, and noncompliant public officers are prohibited from proceeding as if they had complied with the statute.

In that case, the trial court's failure to provide the claimant-surety notice within seven days of defendant's failure to appear barred forfeiture of the bail bond posted by the surety. In other

words, the trial court's failure to comply with the seven-day notice provision of the statute barred forfeiture of a bail bond posted by a surety because the statute was mandatory, and the public officer who failed to act timely was prohibited from proceeding as if he or she had acted within the statutory notice period. *Id.*

This case fits squarely within the exception stated in *Gaston*. Specifically, MCL 400.112g(3)(e) and MCL 400.112g(7) state:

> (3) The department of community health ***shall*** seek appropriate changes to the Michigan medicaid state plan and ***shall*** apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the [MMERP]. The department of community health ***shall*** seek approval from the federal centers for medicare and medicaid regarding all of the following:
>
> * * *
>
> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the [MMERP] because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health ***shall*** provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship.
>
> * * *
>
> (7) The department of community health ***shall*** provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the [MMERP], including, but not limited to, a statement that some or all of their estate may be recovered. (Emphases added.).

Given the statutory language, it must therefore be concluded that the DHHS had to comply with these statutory provisions, as it was mandated that the action of providing written information to individuals be performed at the time of enrollment.

Accordingly, because the doctrine of constitutional avoidance directs this Court to adopt a harmonious interpretation of the separate statutory provisions in MCL 400.112g calling for

written notice describing the provisions of the estate recovery program and the actions that may be taken against an individual's estate at the time the individual applies for enrollment in Medicaid, this Court should exercise its power to remedy the DHHS' violation of these mandatory statutory notice provisions. Here, the only appropriate remedy for the statutory notice violation is to bar the DHHS from retroactively applying the estate recovery program to the estates of the Medicaid beneficiaries, such as the Estate of Olive Rasmer, when the DHHS did not provide the Medicaid beneficiaries with written notice of the provisions of the estate recovery program at the time they applied for enrollment in Medicaid.

II. THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION REQUIRE TIMELY AND REASONABLY SUFFICIENT NOTICE OF THE PROVISIONS OF THE MEDICAID ESTATE RECOVERY PROGRAM AND WHAT ACTIONS MAY BE TAKEN AGAINST THE ESTATE AT THE TIME THE INDIVIDUAL APPLIES FOR ENROLLMENT IN THE MEDICAID PROGRAM FOR LONG-TERM CARE SERVICES.

But even assuming that this Court does not provide a statutory remedy for the DHHS' failure to provide the statutorily required notice, that is not the end of the inquiry. For as already argued in the principal brief, the Due Process Clauses under the state and federal constitutions also require timely and reasonably sufficient written notice of the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services. So even if there is no statutory remedy, there is a ***constitutional*** remedy for such failure to comply with procedural due process.

Evidently, the constitutional argument completely eludes the DHHS, for it simply asserts *ipse dixit* that "The Rasmer's Estate's asserted notice failure does not constitute a procedural due process violation," but without engaging at all with the argument that was made in the

Appellant's brief. (Appellee's Br., pp 26-28). Instead, the DHHS resorts to distorting what the Estate of Olive Rasmer is claiming by falsely stating that "[t]hey [sic] ask this Court to find some fundamental right to be sufficiently informed in order to have the opportunity to do estate planning to shield asserts before a Medicaid application." (Appellee's Br, p 27). As stated in the Estate of Olive Rasmer's principal brief (Appellant's Br., pp 28-30), the due process requirements of timely and reasonably sufficient written notice of the provisions of the estate recovery program and the actions that may be taken against the estate is necessary to allow individuals to protect their rights to dispose of their property. See *Abraham v Doster*, 310 Mich 433, 444 (1945). Here, Olive Rasmer was not afforded a meaningful opportunity to appreciate and understand the potential liability of the assets in her estate at the time of her initial application for Medicaid benefits in violation of due process.

At no point does the DHHS make a serious effort to respond to this argument. Rather, the DHHS follows in the footsteps of the Court of Appeals' decision in *In re Estate of Keyes*, 310 Mich App 266 (2015) by begging the constitutional question without any analysis. As already explained in the Appellees' Appeal Brief in Nos. 153370-153373, statutory notice in this matter was constitutionally insufficient under the Due Process Clauses of the state and federal constitutions. Specifically, ever since *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 (1950), the U.S. Supreme Court has repeatedly affirmed that statutory notice provisions may not be sufficient for due process purposes when there are additional reasonable and affordable measures that will increase the sufficiency of notice. In *Mullane*, the Court made it clear that the party responsible for serving notice must act "as one desirous of actually informing" the individual recipients of their opportunity to protect their property rights. *Id.* at 315. See also

Jones v Flowers, 547 US 220 (2006); *Tulsa Professional Collection Services v Pope*, 485 US 478 (1988); *Mennonite Bd of Missions v Adams*, 462 US 791 (1983).

Consequently, because the DHHS' failure to provide proper written notice of the provisions of the estate recovery program and what actions may be taken against the estate at the time Olive Rasmer applied for enrollment in Medicaid violated procedural due process under the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution, the DHHS is barred from retroactively seeking estate recovery against her Estate.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, this Court should reverse Court of Appeals' decision in *In re Estate of Irene Gorney*, __ Mich App __ (issued Feb 4, 2016) as to the Estate of Olive Rasmer and reinstate the probate court's decision granting the Estate's motion for summary disposition under MCR 2.116(C)(10), denying the DHHS' claim seeking estate recovery in the amount of $178,133.021.

Respectfully Submitted,

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